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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1130

INTERNATIONAL HARVESTER COMPANY, PETITIONER

*v.*

W. WILLARD WIRTZ, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. A1–10) is not yet officially reported. No opinion was rendered by the district court. Its judgment entered on the jury verdict (Pet. A15–18) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 15, 1964 (Pet. A11–12). The petition for a writ of certiorari was filed on May 19, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the failure to make objections in accordance with Rules 49(a) and 51 of the Federal Rules

of Civil Procedure barred the court of appeals from reversing and remanding this case for a new trial in the light of plain and significant errors substantially prejudicial to the public interest in the application of the Fair Labor Standards Act and to the rights of many other employees as well as of the immediate litigants.

2. Whether the individual respondents (employees) filed timely notice of appeal under Rules 54(b) and 73(a) of the Federal Rules of Civil Procedure, by filing within the time concededly available to their co-party (the Secretary of Labor), *i.e.*, within 60 days after the district court's denial of the Secretary of Labor's motion for judgment n.o.v. or for a new trial.

## STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act, 52 Stat. 1060 (1938), as amended, 63 Stat. 910 (1949), 75 Stat. 65 (1961), 29 U.S.C. 201 *et seq.*, are printed in the petition for certiorari (Pet. 5). Petitioner relies on or refers to Rules 51, 49(a), 54(b) and 73(a) of the Federal Rules of Civil Procedure, which are printed in the petition at pages 11, 15, 19 and 20, respectively.

Also pertinent are the following provisions of 28 U.S.C.:

> § 2106. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appro-

priate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. [June 25, 1948, c. 646, 62 Stat. 963.]

§ 2107. Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

* * * * * *

**STATEMENT**

This action was commenced by individual employees of petitioner's outlet in Wichita Falls, Texas, to recover wages claimed to be due them under the Fair Labor Standards Act (R. 6–18). Petitioner stipulated that these employees were, for a substantial period of time, engaged in commerce or the production of goods for commerce within the meaning of the Act, and also stipulated the amount of unpaid wages they would be entitled to recover in the event final judgment was entered for them (R. 388–389). However, petitioner contended that its Wichita Falls outlet was exempt as a "retail or service establishment" under Sections 13(a)(2) and 13(a)(19) of the Act (R. 32–33). The Secretary of Labor was permitted to intervene (R. 22) on the allegation that the claim to these exemptions presented a question

"seriously affecting a very large number of establishments and employees engaged in such activities and directly and which seriously affects the public interest," and that the determination of the issues "would directly and materially affect the interpretation and administration of the said Act" (R. 20).

Prior to trial before the jury, certain facts and issues in the case were stipulated (R. 388-389). It was stipulated, *inter alia*, that "over 25% of the defendant's sales of goods and services at its Wichita Falls, Texas, store for the period in question were sales of motor trucks to customers operating five or more automobiles or trucks for business purposes *at a discount*" (R. 389, emphasis added). It was further stipulated that one of the material issues in controversy was whether or not "sales made to such operators made *at a discount* are * * * recognized *in* the industry as retail sales" (R. 389, emphasis added). There was also uncontroverted testimony by International Harvester's local managers that the majority of the Wichita Falls outlet's customers were commercial operators of 12 or more vehicles, which qualified them automatically for the company's established "fleet discount" (R. 215, 180–181, 186), and that the line of vehicles and other automotive equipment sold to such customers (constituting the bulk of the outlet's business) is "primarily and basically industrial or commercial" which the general public would not be likely to buy (R. 214–215).

Despite these stipulations and admissions, the district court submitted the case on a special issue which omitted from the jury's consideration the fact that the

sales were made "at a discount" and misstated the question as to recognition by asking whether the sales were recognized as retail "by" the industry, rather than "in" the industry (R. 146; Pet. 3). Based on the jury's answer to the "Special Issue," so phrased, the district court entered judgment against the respondents and declared that the petitioner's operation at Wichita Falls is a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act and that the Act's wage provisions do not apply with respect to "any employee" employed by petitioner at its Wichita Falls establishment (R. 149; Pet. A17–18). The Secretary's motion for judgment notwithstanding the verdict or in the alternative for a new trial (R. 150) was overruled without opinion (R. 374). Notices of appeal were filed by the Secretary and by the individual respondents within 60 days after denial of the Secretary's motion (R. 375, 376). On appeal, in addition to the above-described errors, a number of other errors were specified, including the denial of the Secretary's motion for a directed verdict at the close of defendant's evidence in chief (R. 289)[1] in view of the plain inadequacy of the evidence to sustain the employer's statutory burden of proving that its establishment "plainly and unmistakably" met the conditions for exemption. See *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 291, 295; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392.

[1] The statement of the court of appeals that "the Secretary did not file a motion for directed verdict" (Pet. A10) is mistaken.

The court of appeals, finding that "there is no doubt but that the special issue presented to the jury was wrong" and "of extreme significance" (Pet. A8–A9), and noting that this "litigation is not, of course, a private contest," but is "litigation touching upon the proper application of the Wage and Hour law, which has a broad public purpose independent of the rights of the particular persons who appeared as the original plaintiffs in the suit below" (Pet. A7), concluded that this was "one of the exceptional cases" requiring it to reverse the judgment and remand for a new trial, notwithstanding a failure to comply with the rules of procedure (Pet. A9). With respect to the Secretary's contention that it was error for the trial court to refuse to direct a verdict in his favor, the court of appeals, noting that "there is considerable confusion as to the precise 'industry' with reference to which the several witnesses testified," concluded that this matter "should be left open for consideration in the trial court when a new trial is had" (Pet. A10).

The court below ruled that the appeal of the individual employees was timely, citing its decision in *Phinney* v. *Houston Oil Field Material Co.*, 252 F. 2d 357 (Pet. A10), to the effect that, under Rule 54(b) of the Federal Rules of Civil Procedure, the time for appeal does not begin to run against any party until all claims are finally adjudicated—final judgment here being entered against the Secretary only after denial of his post-trial motion.

## ARGUMENT

The rulings below were clearly within the scope of well-recognized appellate discretion, and the petition presents only issues as to the exercise of that procedural authority. The present decision does not conflict with the decisions of any other court of appeals. The reversal and remand for a new trial were plainly warranted by the importance of the underlying substantive issues concerning the interpretation and application of the "retail" exemption of the Fair Labor Standards Act.[16]

1. The decision below is clearly a proper application of the governing principles that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them" (*Hormel* v. *Helvering*, 312 U.S. 552, 557) and that "[i]n exceptional circumstances, * * * appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160; see, also, *Silber* v. *United States*, 370 U.S. 717.

Petitioner does not challenge the rulings below that the errors infecting this case were "basic, plain and clear" (Pet. A9), amounting to a failure "to submit to the jury the essential ingredients of the cause of

[16] The petition does not present these substantive issues for determination, nor do we believe that the record in this case in its present posture warrants their consideration by this Court at this time.

action" (Pet. A9),[2] and that there is a "broader interest than that of the immediate litigants in the correct determination of [this] case" (Pet. A7).[3] Its contention seems to be that because of the statement in *Atkinson* that the "plain error" principle applies "especially in criminal cases," it should be restricted to criminal cases and should not "prevail in civil

[2] Eligibility for the retail exemption requires proof, *inter alia*, by the claimant that 75% of its sales is recognized as retail "in" the industry. See Section 13(a)(2) (Pet. 5).

The legislative history is explicit that the statutory language "*in* the particular industry" does not mean "by" the industry, and that the "industry recognition" language would not "throw the situation wide open for each industry to determine whether it sales shall be considered retail or wholesale" (see 95 Cong. Rec. 12510, 12501). The "significant difference" between recognition "in" and "by" the industry (see opinion below, Pet. A9), has also been stressed by other court decisions. See, *e.g.*, *Durkin* v. *Casa Baldrich, Inc.*, 111 F. Supp. 71, 74 (D. P.R.), affirmed, 214 F. 2d 703 (C.A. 1); *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (C.A. 1); *Mitchell* v. *City Ice Co.*, 273 F. 2d 560, 561 (C.A. 5).

The materiality of the "discount" feature is equally clear from the legislative history, which is replete with disavowals of any intent to include "within the purview of retail sales * * * purchases * * * made in such quantities as to entitle the purchaser to discounts such as are allowed in wholesale transactions" (95 Cong. Rec. 12501; and see 95 Cong. Rec. 12495; 12505; 12502; 12494; 12497).

[3] Petitioner's attempt to attribute the full blame for these errors to counsel for the Secretary was put in proper perspective by the Court of Appeals which pointed out that since it was apparent "that all parties and the Court were thoroughly familiar with the requirement that the International Harvester Company carry the burden of proving how the sales were regarded *in* the industry rather than *by* the industry, it was just as much the responsibility of the appellee to see that the issue was properly phrased as it was that of the Secretary, so far as achieving justice in the case was concerned" (Pet. A[illegible]), and, moreover, that "the failure of the trial court to include the words 'at a discount,'" was caused by petitioner's omission (Pet. A7).

cases" (Pet. 13). But the full answer to this contention is the *Hormel* decision, *supra*, and the statutory authority of this Court "or any other court of appellate jurisdiction" to modify, reverse and remand "or require such further proceedings * * * as may be just under the circumstances." 28 U.S.C. 2106, *supra*, pp. 2–3.

2. The conflict which petitioner asserts between decisions of the Ninth Circuit and that of the court below (Pet. 11–13) is without substance. The Ninth Circuit decisions did not involve the public interest in the application of a federal statute, nor a declaratory judgment affecting many more persons than those immediately involved as litigants, but, instead, touched only the private rights of the immediate litigants.* The Ninth Circuit decisions do not question *the authority and discretion* of the appellate courts to invoke the "plain error" rule in civil cases, but rest rather on the rule that the court has "no obligation" to invoke this authority when there has been a failure to comply with Rule 51. See *Cosper* v. *Southern Pac. Co.*, 298 F. 2d 102, 105, where it ruled that "[e]ven though under our view of the case *we have no obligation to go into the merits* of the appellants' contentions on this appeal,

*When (as in the Ninth Circuit cases) only the rights of private litigants are affected, the Fifth Circuit has applied Rule 51 in the same manner as the Court of Appeals for the Ninth Circuit. See, *e.g.*, *Williams* v. *Hennessey*, 328 F. 2d 490, 491; *American Fidelity & Casualty Company* v. *Drexler*, 220 F. 2d 930, 934–935; *Hanover Fire Insurance Company* v. *Sides*, 320 F. 2d 437, 445; *Pruett* v. *Marshall*, 283 F. 2d 436, 440–441; *Seaboard Air Line Railroad Company* v. *Horowitz*, 277 F. 2d 738; *Haugh* v. *J. R. Cudee*, 265 F. 2d 130; *Risk* v. *Employers Liability Assurance Corporation*, 236 F. 2d 62, 68.

we have examined the original instructions and the later instruction given by the trial judge in answer to the written question; and we see no substantial conflict between them." This was also the rationale of the court below, except that its examination revealed plain error seriously prejudicial to the public interest. We know of no case, and petitioner has cited none, where the Ninth Circuit or any other court of appeals has refused to give relief where substantial public interest may have been prejudiced by the improper formulation of issues involving the application of a federal regulatory statute. On the contrary, the Court of Appeals for the Ninth Circuit has expressly declared that there is "no rigid and undeviating judicially declared practice" to "decline to consider all questions which have not previously been specifically urged" and that "[i]ndeed there could not be without doing violence to the statutes which give federal appellate courts the power to modify, reverse or remand decisions 'as may be just under the circumstances'" [citing 28 U.S.C.A. § 2106, quoted supra, pp. 2–3]. See *Nuelsen* v. *Sorensen*, 293 F. 2d 454, 462 (C.A. 9).

3. The court below properly held that the notice of appeal filed by the individual respondents was

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As a matter of fact, in many of the Ninth Circuit decisions in which it cites Rule 51 against an appellant, the court does actually review the unobjected-to rulings and instructions and reaches a determination that they were either not erroneous or were not sufficiently prejudicial to necessitate reversal of the judgment. In addition to *Cosper* v. *Southern Pac. Co.*, *supra*, see, *e.g.*, *Crespo* v. *Firemen's Fund Indemnity Co.*, 318 F. 2d 174, 175; *Rudick* v. *Prineville Memorial Hospital*, 319 F. 2d 764, 770; *Hargrave* v. *Weilman*, 276 F. 2d 948, 950–951; and *Southern Pacific Co.* v. *Villarreal*, 307 F. 2d 414, 415.

timely since the Secretary's motion for judgment n.o.v., or in the alternative, for a new trial, extended the time for appeal for all parties to the suit (Pet. A9–10). This construction by the court below is plainly in accord with the intent of the amendment to Rule 54, dealing with judgments involving multiple parties,[6] which was to alleviate the problem of "piecemeal appeals." See 28 U.S.C.A., Rule 54, p. 205, Notes of Advisory Committee on Amendment to Rules. Petitioner cites no authority to the contrary. See, also, 28 U.S.C. § 2107 (*supra*, p. 3) and Rule 73(a) (Pet. 20) expressly providing that the time for appeal in any action in which the United States or an officer or agency thereof is a party shall be the same "as to all parties."

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The pertinent portion of Rule 54 is reproduced on page 19 of the petition.

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